

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

CARA LESLIE ALEXANDER,)	
et al.,)	
)	
Plaintiffs,)	
)	
v.)	Civil No. 96-2123
)	97-1288
)	(RCL)
FEDERAL BUREAU OF)	
INVESTIGATION, et al.,)	
)	
Defendants.)	
_____)	

MEMORANDUM OPINION

This matter comes before the court on Plaintiffs' Supplement to their Motion to Compel the Production of Documents Regarding their Second Request to the Executive Office of the President ("EOP") Regarding Non-ARMS E-mail, Archived Computer Drives, and Other Computer Documents. On May 17, 2000, this court ruled on the Plaintiffs' Motion to Compel the Production of Documents, but deferred on the plaintiffs' requests as to e-mail and hard drives. On June 5, 2000, this court issued a ruling regarding the discovery of e-mail that had been properly transferred to the Automated Records Management system (ARMS). In that ruling, however, the court still deferred on the plaintiffs' requests for hard drives and e-mail that was not archived on ARMS. A hearing was held on this matter before the court on June 30, 2000. Upon consideration of the parties' oral representations at that hearing and their written submissions, the court will

GRANT IN PART AND DENY IN PART the plaintiffs' request for non-ARMS e-mail and other computer documents, as discussed below. A separate order shall be issued this date.

I. Background

The underlying allegations in this case arise from what has become popularly known as "Filegate." Plaintiffs allege that their privacy interests were violated when the FBI improperly handed over to the White House hundreds of FBI files of former political appointees and government employees from the Reagan and Bush Administrations.

The instant dispute revolves around certain e-mail, computer drives and other computer documents, which the plaintiffs assert have never been searched for relevant documents throughout discovery in this case. Plaintiffs request that these items be searched for specific search terms and that all relevant information be turned over to them.

Plaintiffs initially sought to have the EOP search its archived e-mail and hard drives in their first request for the production of documents, served on October 9, 1997. They subsequently filed a motion to compel regarding this request, which this court then ordered to be stricken from the record due to the plaintiffs' failure to confer with the EOP before filing

it, as required by Local Rule 108(m). Alexander v. F.B.I., 1997 WL 1106579, at *1 (D.D.C. 1997).

On January 12, 1998, plaintiffs served on the EOP a Notice of Deposition and Request for Production of Documents ("Notice") pursuant to Rule 30(b)(6) and (b)(5) of the Federal Rules of Civil Procedure. The Notice requested that the EOP designate "one or more" representatives to testify on a number of topics, including the scope of the EOP's prior search of e-mail and hard drives for responsive documents.

In response, the EOP moved for a protective order, arguing that it should not be required to search through its entire system of e-mail and deleted hard drives. In support of its objection, the EOP provided the court with two declarations addressing the feasibility and burdensomeness of restoring and searching through all e-mail and hard drives. These declarations were prepared by Laura Crabtree, the Desktop Systems Branch Chief of the Information Systems and Technology Division ("IS & T") at EOP's Office of Administration, and Daniel Barry, a Computer Specialist at IS & T. The declaration of Crabtree discussed the feasibility of restoring files deleted from EOP hard drives and of restoring and searching the archived hard drives of departed employees. The declaration of Daniel

Barry addressed the White House e-mail system.¹ The EOP argued that these declarations demonstrated that the burden and cost of performing a search of all e-mail and hard drives, as the plaintiffs requested, outweighed the remote likelihood that the search would lead to any relevant information. The EOP agreed alternatively "to conduct targeted and appropriately worded searches of backed-up and archived e-mail and deleted hard-drives for a limited number of individuals." EOP's Reply in Supp. of EOP's Mot. for Protective Order Quashing Rule 30(b)(6) Dep. Notice ("EOP's Reply to Dep. Notice") at 8 n.7.

On April 13, 1998, this court held that the EOP was "not required to completely restore all deleted files and e-mail as plaintiffs insist." Alexander v. FBI, 188 F.R.D. 111, 117 (D.D.C.1998). In reaching that decision, the court relied on the fact that the EOP had agreed to perform targeted searches of e-mail and archived hard drives for specific individuals, and

¹ Barry attested that prior to July 1994, there existed no system for archiving e-mail in a word-searchable format, and, thus, e-mail was stored daily on back-up tapes. He also stated that, for the period of January 1993 to July 1994, there existed approximately 5,500 tapes containing backed-up e-mail, which IS&T was in the process of restoring and reconstructing to a word searchable format. He explained that this restoration required five to seven working days of around-the-clock processing at a cost of approximately \$20,000 for each month of e-mail. Accordingly, he estimated that all of the e-mail would be restored by the middle of 1998. Barry further attested that all e-mail since July 1994 has been archived weekly in an on-line format capable of being word-searched.

had invited the plaintiffs to engage in discussions with them regarding the specific searches to be performed. See id. (citing the EOP's Reply).

Plaintiffs then served their second set of requests for the production of documents on October 27, 1998. Request number 19 of this set of requests sought disk mirroring copies of all computer hard disk drives for each computer used by persons in the Office of Personnel Security ("OPS") during Craig Livingstone's tenure there. The EOP objected to this request, stating that all documents located on these hard drives had already been downloaded and searched in connection with this litigation. See EOP's Resp. to Second Set of Interrogs. at 17.

Request number 28 of this set of requests sought all e-mail correspondence to or from five individuals that was recovered in previous e-mail searches performed by the EOP as described by Daniel Barry in his June 11, 1998 deposition. The EOP objected to this request as overbroad and irrelevant. The EOP further responded that it "stands ready, as previously offered, to perform searches of archived White House e-mail within parameters as to date, users, and search terms reasonably calculated to lead to the discovery of relevant information without imposing an undue burden on the EOP." EOP Resp. to Pls.' Second Req. for Produc. of Docs. at 26.

The plaintiffs filed a motion to compel as to their second

request for the production of documents on June 14, 1999.² Prior to the court's ruling on this motion, however, there were several new developments regarding the discovery of e-mail, hard drives, and other computer documents. These developments are discussed in great detail in this court's prior opinion of June 5, 2000. See Alexander v. FBI, 2000 WL 739231 (D.D.C. 2000). The court will now summarize those developments pertinent to the issues at bar - the discovery of non-ARMS e-mail, C:drives, F:drives and Robert Haas' computer files.

Regarding the e-mail, the plaintiffs discovered on February 19, 2000, that, from August 1996 to November 1998, incoming e-mails to nearly 500 people in the EOP, including top-level employees, were not transferred to ARMS and, therefore, were never and can not now be word searched on-line. See Third Decl. of Sheryl Hall at 2 (Feb. 19, 2000)(attached as Exhibit A to Pls.' Emergency Mot. to Supplement Pls.' Mot. to Compel and Req. for an Evidentiary Hr'g). These e-mails do still exist, however, on back-up tapes. Furthermore, Sheryl Hall, a computer

²This was a revised motion to compel. Plaintiffs initially filed a motion to compel documents regarding their second request for documents on March 26, 1999, but they then withdrew that motion. The parties then engaged in negotiations regarding the plaintiffs' original motion. Pursuant to these negotiations, the EOP provided the plaintiffs with supplemental information and documentation on April 22, and April 29, 1999, and the plaintiffs revised their original motion to compel.

specialist at the White House, also attested that White House officials learned of this problem in May of 1998, and that several employees who knew about the problem were threatened with jail or the loss of their jobs if they told anyone else about it. Id. at 4-5.

Regarding the archived hard drives, the plaintiffs filed on March 7, 2000, as an exhibit to their motion for an expedited *ex parte* conference, the Fourth Declaration of Sheryl Hall, in which she stated that she had received information from a White House Office of Administration ("OA") employee that the White House was planning to destroy archival cartridge tapes of the computer hard drives of departed White House staff members.

At a hearing before this court on March 10, 2000, the EOP assured the court that "the e-mail in question, to the extent it exists is being preserved, and is not being, and will not be overwritten."³ EOP's Resp. to Mem. and Order of March 15, 2000 at 1. The EOP also advised the court that as to the hard drives, their current policy is to make back-up, archival tapes of the hard drive files of departed employees, often referred to

³The hearing on this matter began at 11:30 a.m. The court, then ordered that the hearing be continued at 5:00 p.m. that same day, so that the EOP would have a chance to meet with the appropriate White House officials in order to be able to provide the court with the requested assurances.

as "reallocated tapes," and not to destroy these tapes.⁴

On March 23, 2000, the EOP moved to have the court indefinitely stay its consideration of the e-mail issue due to the overlapping investigations of the Department of Justice's Criminal Division and the Office of Independent Counsel regarding a possible White House cover-up of the e-mail problem. The court held a hearing on the EOP's motion on March 24, 2000. At that hearing, the court took the EOP's motion to stay under consideration. At the EOP's suggestion, the court further ordered that the Criminal Division of the Department of Justice provide the court with periodic *ex parte, in camera* status reports in chambers on the progress of its investigation, beginning on March 30, 2000.

Also at the March 24, 2000 hearing, the plaintiffs first raised the issue of the possible existence of a "zip" disk containing several e-mail messages. This disk was made from the F: drive file of Robert Haas, a White House computer specialist. Counsel for the EOP, James Gilligan, responded that he had recently become aware that such a "zip" disk did exist. He further represented that he would later provide additional assurance to the court that the disk was being preserved. On

⁴Approximately 600 of these reallocated tapes exist. These tapes are completely separate from the 3,400 system back-up tapes, which contain the e-mail in question, along with all other material on the computer system at the time of the "back-up."

March 27, 2000, Mr. Gilligan provided this assurance in the form of a letter to the court stating that the "zip" disk was being stored in the custody of Charles Easley, EOP Security Officer, under the same conditions of security as the 3,400 e-mail back-up tapes, as described in Mr. Easley's earlier affidavit.

On April 3, 2000, the EOP filed its response to the plaintiffs' motion for an evidentiary hearing on the preservation of hard drives. The EOP provided the declaration of Michael Lyle, Director of the Office of Administration, who stated that the EOP had no plan to alter or destroy the reallocated tapes of the hard-drive files of departed employees. He further stated that he had assigned the task of safeguarding these tapes to Mr. Easley, the EOP Security Officer. Easley provided a second declaration attesting that he was preserving the 600 reallocated tapes, in addition to the Haas "zip" disk and the 3,400 system back-up tapes containing e-mail, and describing the manner in which they were being preserved.

On April 27, 2000, the court held another hearing regarding this dispute. At that hearing, the court again denied the plaintiffs' request that the court take custody of the e-mail back-up tapes, hard drives and "zip" disk. The court held the plaintiffs' motion for an evidentiary hearing and the plaintiffs' motion for an order to show cause concerning the "zip" disk in abeyance so as not to interfere with the

Department of Justice's criminal investigation into the matter. The court then stated that it would first rule on the issue of the search to be performed regarding e-mail that had been successfully transferred to ARMS, and then later issue a separate order regarding the search of non-ARMS e-mail, hard drives, F:drives, and other computer documents.

On May 17, 2000, the court issued an order regarding the plaintiffs' second request for the production of documents, but deferring on those requests concerning hard drives and e-mails. The court then issued, on June 5, 2000, an order regarding the search to be performed on all e-mail that was properly transferred to ARMS. Having so ruled, the court now turns to the search to be performed on non-ARMS e-mail and other computer storage devices, such as hard drives, F:drives, and zip disks.⁵

The plaintiffs filed their supplemental brief regarding the search of non-ARMS e-mail, hard drives, and other computer documents on May 5, 2000. The EOP filed their response on June 5, 2000. The plaintiffs then filed their reply on June 14, 2000. On June 30, 2000, the court held a hearing on these

⁵The court will continue to temporarily hold in abeyance the issue regarding the allegations that the White House "covered-up" the missing e-mails once they were discovered by threatening employees and withholding information from this court, criminal investigators, and Congress, as this issue remains the focus of the ongoing criminal investigations.

issues. At that hearing, the EOP represented that it had not yet started restoring the back-up tapes containing the non-ARMS e-mail. The plaintiffs, in response, requested that the court hold an evidentiary hearing regarding the EOP's efforts to restore non-ARMS e-mail so that it may be searched for relevant information, and renewed their request that the court appoint a special master to oversee a search of the non-ARMS e-mail, the archived C: drives, the F: drives, and Robert Haas' computer files.

II. Analysis

A. Non-ARMS E-mail

1. The Parameters of the Search

Plaintiffs originally requested that the EOP be required to search all e-mail that was not transferred to the ARMS system. The EOP responded that the search of the non-ARMS e-mails should be limited to the same parameters established for the ARMS e-mail. This court issued its ruling on the ARMS search on June 5, 2000. Subsequently, the plaintiffs, in their reply, modified their request and now seek that the non-ARMS e-mail be searched in accordance with those parameters set by the court for the

ARMS e-mail, with the addition of a few search terms.

The plaintiffs seek to add the search terms "FBI data," "FBI raw data," "FBI reports," "FBI summaries," and "FBI background" to the list of search terms used regarding Filegate. Plaintiffs originally requested, in their ARMS e-mail brief, that both "FBI" and "FBI files" be used as search terms. The court rejected the use of "FBI" as a search term, however, as overly broad, allowing only the more narrow term "FBI files" to be used. Alexander v. FBI, 2000 WL 739231, *11 (D.D.C. June 5, 2000). The plaintiffs now argue that the term "FBI files" alone may inadvertently exclude relevant e-mail, and, therefore, request that these additional terms be used. At the June 30, 2000, hearing, the EOP stated that it did not object to these additional terms. Therefore, as both parties agree, the search of the non-ARMS e-mails shall be conducted in the same manner as set out by this court's June 5, 2000 order, with the addition of "FBI data," "FBI raw data," "FBI reports," "FBI summaries," and "FBI background" to the list of search terms used regarding Filegate.

2. The Timetable for Performing the Search

The plaintiffs seek to have responsive non-ARMS e-mail, as well as other requested computer documents, produced to them

within 30 days. They contend that, despite the EOP's statements to the contrary, production within this timeframe is, in fact, possible. The plaintiffs allege that the EOP is "purposefully acting in a way so as to make the [non-ARMS e-mail] 'fix' expensive and time-consuming" Pls.' Reply to EOP's Response to Pls.' Supplement to Pls.' Mot. to Compel Produc. of Docs. at 4. Accordingly, they request that the court hold an evidentiary hearing to determine the most expeditious manner to perform the search and produce any results. They further request that, in order to avoid any inordinate delay, the court appoint a special master to oversee the restoration and search of the non-ARMS e-mail.⁶

The EOP argues, however, that it is proceeding with the reconstruction process as quickly as possible, while still ensuring complete and accurate data recovery and preservation of original data. They argue that the reconstruction effort is a complex undertaking, involving a number of technical variables, that necessarily requires a significant amount of time to undertake.

In support of this argument, the EOP provided the court with the declaration of Gregory Ekberg. Ekberg is a project manager

⁶The plaintiffs also request that the Special Master oversee all other searches of computer documents which they now seek, including searches of the C: drives, F:drives, and Haas' computer files, which are addressed below.

with Vistronix, Inc., an information technology company that was retained by the EOP to provide independent validation and verification ("IV&V") of the e-mail restoration process. See Eckberg Declaration at ¶4 (June 2, 2000). In his declaration, Ekberg states that the back-up tapes containing non-ARMS e-mail are not formatted in a manner that allows access to individual user files or searches of the text therein. Id. at ¶10. Therefore, according to Ekberg, the data on the tapes must first be extracted and restored to a readable and searchable format before any search is performed. Id. Ekberg further explains that this process will consist of two phases; (1) the pre-processing phase, and (2) the data extraction and "de-duping" phase. Id. at ¶15.

The pre-processing phase includes such tasks as defining the project requirements, designing the computer system, acquiring and/or developing the required system hardware and software, developing the processes, procedures, and methodologies to be followed in carrying out the reconstruction, obtaining operator security clearance, training the operators, and testing the system. Id. at ¶16. This phase also includes preparing a working copy and a control copy of each original back-up tape from which e-mail is to be restored, in order to ensure that the

original data is preserved. Id. at ¶17.⁷

The EOP's plan, according to Ekberg, is to copy an initial test batch of tapes to determine whether the system is working properly, to correct any problems if it is not, and "to gather performance metrics to extrapolate a timetable for tape duplication." Id. at ¶20. Once this is performed, the tape copying can then begin. The EOP's goal is to copy 24-44 tapes per day. Id. Ekberg stated in his declaration that the EOP planned to complete testing and be ready to begin copying tapes by mid-to-late June 2000. Id.

After the tapes are copied and the pre-processing phase has been completed, the restoration process then enters the second phase, extraction and de-duping. Id. at ¶21. According to Ekberg, the extraction process involves reading the data on the working tape copies, extracting any unrecorded e-mail messages contained thereon, and copying them into a database in a word-searchable format. Id. Ekberg further states that, "because the e-mails on the various back-up tapes were created in

⁷Ekberg states that handling the original tapes, which have exceeded their shelf life and have been used frequently in the past, would increase the risk of tape damage and loss of the data. See Ekberg Declaration at ¶17. He further states that even if a tape were to break the first time it was handled, it would be preferable to have the tape break while copying rather than during data extraction, as copying would preserve all the data on the tape to the point of the breakage, where extraction of the data would not. See id. at ¶18.

different software environments (the White House uses LOTUS Notes, for example, while OVP uses CC: Mail), a process will have to be developed to convert the extracted e-mails into a common file format so that they can be loaded into a common, searchable database." Id.

All e-mail duplicates would then need to be eliminated, a process call "de-duping." Id. at ¶22. According to Ekberg, this is necessary because, as these tapes are the result of periodic system-wide back-ups, the same data often appears again and again from one set of back-up tapes to the next. Id. Thus, Ekberg states, it is much more efficient to delete the duplicates before performing the search, rather than eliminating them manually during the production process. Id. Then, once the extraction and de-duping process is complete, the search of the non-ARMS e-mail can finally begin.

The EOP, however, is unable to provide the court with even a rough estimate of how long this process would take to complete. Ekberg states in his declaration

It is not now possible to provide a meaningful estimate of the time to project completion. Project requirements, software specification and data-processing methodologies are still being defined at several phases of the project. There are several unresolved technical issues with the project, and other unknowns . . . that can impact the time to completion.

Id. at ¶12. These unresolved issues include determining what

equipment should be used to copy the tapes and developing a process to convert the e-mails, once they are extracted, into a common file format so that they can be loaded on one searchable database. See id. at ¶¶20-21. The only estimate that Ekberg has given to the court is that the White House hoped to have completed testing and be ready to copy the first identified batch of tapes⁸ by mid-to-late June 2000. See id. at ¶20.

This estimate, however, proved to be incorrect. At the hearing before this court on June 30, 2000, the EOP stated that it was not yet ready to begin copying tapes as it had been unable to find a tape duplication system to meet its needs. The EOP explained that it first attempted to use a tape duplication system recommended to it by certain investigative bodies, but that system, upon testing by the EOP, was found to be insufficient as it could only copy two tapes per day, well below the "EOP's goal of 24-44 tapes per day." Id. at ¶26. Accordingly, the EOP stated, it then submitted a second duplication system to the investigative bodies involved for their testing and approval. See id. That second system was approved and sent to the EOP for "stress-testing" to determine if it could meet the EOP's 24-44 tapes per day goal. See id.

⁸In order to expedite the availability of searchable data, the EOP proposes to conduct the tape-copying and extraction processes on a rolling basis, processing certain tapes chosen by the court or other investigative bodies as "top priority" first. See id. at ¶25.

According to the EOP, however, that system broke down during stress-testing, requiring the EOP to identify and propose a third system, which is now being examined by the investigative bodies for their approval. The EOP stated that, because of these technical problems, it has not yet copied any tapes, much less extracted any e-mail thereon, despite the fact that it has now had twenty weeks to do so.

The EOP does not explain, however, exactly how these technical issues have prevented it from copying even one e-mail back-up tape. As noted above, the first tape duplication system, recommended to the EOP by the investigative bodies involved, had the ability to copy two tapes per day. See id. Had the EOP begun copying tapes on that system, well over 200 back-up tapes would now be copied. The EOP states that, in order to "expedite the availability of the searchable data," it did not begin copying tapes on this system because its rate of only two tapes per day did not meet its goal of 24-44 tapes per day.⁹ Id. at ¶24, 26. Elementary mathematics illustrates, however, that copying two tapes each day is better than none. By analogy, if the data at issue were in hard-copy rather than computer form, the EOP's position would essentially be that it

⁹The court further notes that it is quite possible that the EOP's goal might never be met, particularly in light of Ekberg's description of such a goal as "ambitious given the conditions under which the project is proceeding." Ekberg Decl. at ¶20.

need not copy or produce a single document until it could find a copier capable of reproducing large quantities of the documents together. This court cannot accept such a preposterous position.

The EOP's argument is particularly bewildering in light of its statement that it planned to divide the tapes into smaller groups for processing on a "rolling basis" in order to make e-mail available for searching more quickly. Id. at ¶24-25. Accordingly, as the EOP itself acknowledges, once a few tapes are copied, even at a rate of only two per day, the e-mail on those tapes can then be extracted, de-duped and made available for searching. Therefore, had the EOP begun copying tapes, not only would some data now be available for searching, but also the EOP could have tested its capability to complete the restoration process, modified its plan as necessary, and developed an estimate for when the entire process could be completed.

The EOP did not do this, however. Nor has it provided the court with any explanation of why it did not do so. Instead, after twenty weeks, the EOP has not made one concrete step towards producing any of the non-ARMS e-mail, and can not give the court any estimate of when it might do so. Accordingly, the court finds that an evidentiary hearing to determine the best way to restore and search non-ARMS e-mail is warranted. The

evidentiary hearing shall be scheduled immediately.¹⁰ The court will defer its ruling on the plaintiffs' request for the appointment of a special master until after this evidentiary hearing.

3. Time Period to be Searched

Non-ARMS e-mail spans the period of August 1996 through May 1999.¹¹ The EOP argues, however, that based on the heavy burden of restoring and searching all back-up tapes containing non-ARMS e-mail, as described above, the court should limit the dates to be searched. The EOP states that such a limit would decrease the number of tapes that need to be restored, thus reducing the time necessary to make the data available for searching. The EOP further contends that limiting the search is proper considering the uncertainty regarding what, if any, benefit the search may have, given that the e-mail at issue postdates the underlying events of this case by several years. Federal Rule

¹⁰The court has been advised in camera, ex parte, that the contemplated evidentiary hearing will not interfere with any on-going criminal investigation.

¹¹The "Mail2" problem, which prevented incoming mail on the Mail2 server from being transferred to the ARMS system, existed from August 1996 to November 1998. When that problem was corrected in November of 1998, another problem, referred to as the "letter D" problem occurred. The latter problem was not fixed until May 1999.

of Civil Procedure 26(b)(2)(iii) states that the court may limit discovery when

the burden or expense of the proposed discovery outweighs its likely benefit, taking into account the needs of the case, the amount in controversy, the parties' resources, the importance of the issue at stake in the litigation, and the importance of the proposed discovery in resolving the issues.

FED. R. CIV. P. 26(b)(2)(iii).

The EOP first proposes that the court limit the search to only those non-ARMS e-mail messages from the period August 1996 to October 1996. It argues that these messages are most likely to contain relevant information as they occurred closest to the time Filegate was discovered on June 1996. Plaintiffs have argued that the period following the discovery of Filegate is particularly relevant because people would be communicating with each other regarding the underlying facts at that time.¹² The EOP argues that searching e-mail originating after October 1996 would be unlikely to uncover relevant information, given that the congressional investigation into the matter was nearly over by the end of the summer and the House of Representatives

¹²The court notes that the EOP cannot be arguing that non-ARMS e-mail originating after October 1996 is not at all relevant, as the EOP made no objection to searching ARMS e-mail for the entire period of August 1996 through May 1999, and it does not now attempt to explain how non-ARMS e-mail from this period would be any less relevant than the ARMS e-mail.

Committee on Government Reform and Oversight issued its interim report on September 28, 1996 ("House Interim Report").

However, as clearly stated in the House Interim Report,

the committee's investigation into the unauthorized possession of hundreds of FBI background files by the White House remains in progress. There are many questions that are unanswered; cooperation from the White House and other witnesses has not been full and complete; more witnesses must be interviewed; and, many more documents from earlier committee requests are outstanding. Accordingly, this is an interim report to inform the public as to the status of the investigation in the closing days of the 104th Congress.

H.R. REP. NO.104-862, at 1 (1996). Thus, the House investigation into Filegate was clearly not finished as of October 1996. Furthermore, this civil suit was not filed until September 12, 1996. The plaintiffs took numerous depositions and made several document requests subsequent to October 1996. Mrs. Clinton, a named defendant in this case, was deposed by the Independent Counsel about Filegate in February of 1998. Thus, the court rejects the EOP's proposal that the search be limited to the period of August 1996 to October 1996.

At the hearing on June 30, 2000, however, the EOP stated that their proposal as to this particular time period was only a suggestion. The EOP then proposed that the court limit the search to a number of specific dates of the court's choosing. The EOP argued that, by initially limiting the search to a few

select dates scattered throughout the time period non-ARMS e-mail was created, the court can decrease the time and expense necessary to determine whether the non-ARMS e-mail contains any relevant information. Once the results of this initial search have been produced, the court can then better determine the likely benefit of a broader search of all non-ARMS e-mail.

The court agrees with the EOP's argument. In order to accelerate the process of searching non-ARMS e-mail, the court will order an initial restoration and search of only a limited number of select back-up tapes, which will be determined after the evidentiary hearing ordered herein. The court will defer its ruling on the issue of whether all non-ARMS e-mail should be searched until it can better determine the likely benefit and total burden and expense of conducting such a search.

4. The Attempted Retrieval of E-Mail and F: Drive Data from "Recycled" Tapes

Approximately six months of the back-up tapes containing e-mail and other material from June 1997 to November 1997, were recycled and the information contained therein was overwritten. The plaintiffs request that a court supervised expert attempt to recover e-mail and F: drive data from these recycled tapes.

The EOP explains that data could be recovered in two ways.

First, if a smaller portion of the tape was used when it was recycled, then original data at the end of the tape (in technical terms, beyond the "logical end of tape") may not have been overwritten and may be recoverable. Second, there may be fragments of original data in "unused segments" of overwritten portions of the tape.

The EOP argues that the plaintiffs' request should be denied based on the heavy burden involved as weighed against the small likelihood of recovering any data at all, much less relevant information. The court agrees that the likelihood that performing such a task would produce any relevant information, as weighed against its burden, is insufficient for this court to require it at this time. Thus, the plaintiffs' request as to the recycled back-up tapes is denied.

B. C: Drives (Hard Drives) of Departed Employees

The plaintiffs also seek to have archived C: drives (also known as hard drives) restored and searched. There are approximately 600 reallocated tapes, which contain C: drives of White House employees. These C: drives were usually archived upon an employee's departure from the White House, so that the C:drive could then be wiped clean for a new employee.

Plaintiffs initially request that all of the reallocated tapes be searched. This court has already rejected this request, however, based on the EOP's objection to such a search as unduly burdensome.¹³ See Alexander v. FBI, 188 F.R.D. 111, 117 (D.D.C. 1998) (rejecting plaintiffs' request that the court order the EOP to completely restore all hard drives, and stating instead that the plaintiffs should pursue discussions with the Department of Justice regarding targeted searches of e-mail and hard drives for a limited number of individuals.) The plaintiffs revise their request, however, in their reply, to seek a search of only the hard drives of those individuals whose e-mail was searched pursuant to this court's June 5, 2000 order. The plaintiffs also request that the search be limited to those search terms delineated in that order.

In their response, the EOP argues that the set of individuals to be included in a search of the C: drives should be far narrower than those deemed relevant for the ARMS search. The EOP points out that ARMS is a word-searchable database. The C: drives, on the other hand, exist only on the reallocated tapes, which require restoration prior to searching. As with

¹³In support of the EOP's objection, the EOP provided the court with the Declaration of Laura Crabtree dated March 4, 1998, in which she estimated that the cost of searching through one employee's "C" drives would take approximately 265 hours and cost \$15,675 in contractor fees.

the non-ARMS e-mail, the EOP seeks to limit the number of tapes that need to be restored and searched due to the cost and time such a process entails.¹⁴

To that end, the EOP first argues that no further searches of C: drives are necessary because the EOP has already searched the hard drives of all the former Office of Personnel Security ("OPS") computers as of June 1996.¹⁵ The court disagrees with the EOP's argument. As the EOP itself points out, there are other highly relevant departed employees of the White House whose C: drives have not been searched, such as Bernard Nussbaum, a named defendant in this case.

However, the EOP also proposes that, in the event that the court considers searches of additional archived C: drives, the search be limited to Bernard Nussbaum and Bill Kennedy, under whose jurisdiction the OPS fell. It further proposes, because Nussbaum testified that he did not have a computer, to search

¹⁴The non-ARMS e-mail back-up tapes each represent a particular time period, during which the system was backed up. The reallocated tapes, on the other hand, are grouped to represent a particular individual's hard drive.

¹⁵The plaintiffs also request that any archival tapes made from OPS computers during Livingstone's tenure but prior to June 1996 also be searched. Given the clear relevance of the OPS and the likely benefit of such a search, as evidenced by the EOP's search of these drives as of June 1996, the court will grant the plaintiff request. The EOP shall search, to the extent that they exist, all archival tapes made of OPS hard drives during Livingstone's tenure at OPS prior to June of 1996.

the hard drives of his secretaries, Linda Tripp, Betsy Pond, and Deborah Gorham. The court agrees with this proposal, with one addition. The court will also order the search of Vincent Foster's hard drive due to the fact, as there is evidence that Foster, as Deputy White House Counsel at the time of the underlying events in this case, had a supervisory role over both then-Associate White House Counsel William Kennedy and the director of OPS at the time, Craig Livingstone.

Thus, the EOP shall restore and search the hard drives of William Kennedy, Vincent Foster, Linda Tripp, Betsy Pond, and Deborah Gorham, using those search terms set out by this court's June 5, 2000 order and the additional terms added today.¹⁶ Regarding the plaintiffs' request to search the hard drives of all other individuals included in the ARMS e-mail search, the court finds that the likely benefit of such a search, as established by the plaintiffs at this time, is outweighed by the burden of conducting it. The court notes, however, that the plaintiffs may renew their request as to these individuals once the search ordered herein is performed, if the results of that search indicate that a broader search is, in fact, likely to produce relevant information.

¹⁶Vince Foster's hard drive need not be searched for those terms pertaining to the release of Ms. Tripp's information or the Kathleen Willey letters, as he died in 1994. Ms. Tripp's hard drive also need not be searched for those terms.

C. F: Drive (Shared Drive) Files

Plaintiffs also request that the EOP be required to search the F: drive files that are stored on the same "system back-up" tapes as the non-ARMS e-mail. F: drive files, or "shared" drive files, are files that are shared among certain functional groups of employees. The plaintiffs state that they are now requesting that these drives be searched because they were previously unaware that F: drive documents existed on these back-up tapes and that these documents were not "records-managed."

As the EOP explains, however, the back-up tapes at issue are periodic back-ups of the entire computer network, which are made to be used in the event of a system failure. As such, these tapes include all files on the system at the time of the back-up, including operating system software, applications software, and user files. The EOP further explains that the files contained within the F: drives are, in fact, "records-managed," but "in paper, not electronic form." Lyle Declaration at ¶5 (attached as Exhibit A to EOP Resp. to Pls.' Request for an Evidentiary Hearing Regarding Computer Hard Drives (April 3, 2000)). Therefore, they argue, a search of the backed-up F: drives is unwarranted as the plaintiffs have failed to

demonstrate, or even suggest, that documents residing on these F: drives were not already searched and produced in hard copy form.

In fact, this court has already ruled that the EOP is not required to restore and search F: drives for responsive documents.¹⁷ See Alexander v. FBI, 188 F.R.D. at 116-17 (holding that the EOP was not required to search shared drives due to the cost and burden involved). Thus, as the plaintiffs have not provided the court with any new evidence or demonstrated any particular need for such a search, their request to search the F: drive files on the back-up tapes is denied.

D. All computers and computer media used by Robert Haas

Plaintiffs request that the court order a search of all computers and computer media used by Robert Haas, a White House computer specialist, both at the White House and at home. This

¹⁷Unlike with the e-mail and the archived hard drives, the court did not state that the plaintiffs were able to pursue more targeted searches of the F: drives. See Alexander v. FBI, 188 F.R.D. at 117 ("Plaintiffs are able to pursue discussions with the Department of Justice regarding targeted and appropriately worded searches of backed-up and archived e-mail and deleted hard drives for a limited number of individuals." (emphasis added)). This was due to the fact that a search of the F: drives, even limited to just a few individuals, would still be unduly burdensome and complicated as all F: drives to which those few employees were ever allowed access during their employment would need to be identified, restored and then searched. See id.

request includes the contents of the "zip" disk made from Haas' F: drive, which contains several e-mail messages. This disk has been kept in the custody of Charles Easley, EOP Security Officer, under the same conditions of security as the 3,400 e-mail back-up tapes and the 600 reallocated C: drive tapes, since shortly after its existence was brought to the court's attention by the plaintiffs on March 24, 2000.

The EOP argues plaintiffs have failed to show why Haas' files should be treated differently from the files of any other EOP employee or contractor, as there has been no allegation that Haas had any involvement in the FBI files matter. The plaintiffs respond that they have demonstrated that Mr. Haas has relevant information through the declarations of Sheryl Hall and Betty Lambuth. However, these declarations state only that a contractor for Northrup Grumman, who they now state to be Robert Haas, told them that the non-ARMS e-mail contained information relating to Filegate, as well as other topics. See Third Declaration of Sheryl Hall at ¶6 (February 19, 2000) (attached at Exhibit A to Pls.' Emergency Mot. to Supplement Pls.' Mot. to Compel and Req. for an Evidentiary Hr'g); Declaration of Betty Lambuth at ¶9 (February 24, 2000) (attached as Exhibit A to the Pls.' Second Supplement to Emergency Mot. to Supplement Pls.' Mot. to Compel and Req. for an Evidentiary Hr'g). They do not, however, demonstrate that Haas ever stored these e-mail messages

on his computer at the White House or at home.

The plaintiffs argue that the existence of the "zip" disk, which contains e-mail, demonstrates that Haas saved e-mail messages. Based on this fact, the court does find that a search of that "zip" disk is warranted. As to the remaining files of Mr. Haas, however, the court finds that the plaintiffs have failed to establish a sufficient basis for ordering that they be searched. Accordingly, the court will order the EOP to search the zip disk, currently in the custody of Mr. Easley at the EOP, using the search terms set out by this court's June 5, 2000 order, with today's additional search terms. Plaintiffs' request to search all other computers and computer media used by Robert Haas, however, is denied.

III. Conclusion

For the reasons given above, the court will issue a separate order this date, requiring a search to be conducted in accordance with this opinion and ordering that an evidentiary hearing commence immediately.

Royce C. Lamberth
United States District Court

Date:

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

CARA LESLIE ALEXANDER,)	
et al.,)	
)	
Plaintiffs,)	
)	
v.)	Civil No. 96-2123
)	97-1288
)	(RCL)
FEDERAL BUREAU OF)	
INVESTIGATION, et al.,)	
)	
Defendants.)	
_____)	

ORDER

This matter comes before the court on Plaintiffs' Supplemental Brief to their Motion to Compel the Production of Documents Regarding Second Request to the Executive Office of the President ("EOP") Regarding Non-ARMS E-mail, Archived Computer Drives, and Other Computer Documents. For the reasons given in the corresponding Memorandum Opinion issued this date, it is HEREBY ORDERED that

- II An evidentiary hearing to determine the best way to restore and search non-ARMS e-mail shall commence immediately.
- II The EOP shall restore and search all non-ARMS e-mail from specific dates, which will be selected in a separate order. That search shall be conducted in accordance with the terms set out below.

II The EOP shall search for non-ARMS e-mail from the specified dates containing the following terms:

"background report", "summary report", "OPS", "Dale", "Marceca", "update project", "personnel security", "FBI data," "FBI raw data," "FBI reports," "FBI summaries," "FBI background," "FBI files", "Sculimbrene", "James Baker", "Marlin Fitzwater", "BI", "Privacy Act" or "Brasseux",

for the following individuals' e-mail:

Bernard Nussbaum, Craig Livingstone, Anthony Marceca, Hillary Rodham Clinton, Vincent Foster, Bill Kennedy, Marsha Scott, Betsy Pond, Deborah Gorham, Linda Tripp, Mari Anderson, George Stephanopoulos, Harold Ickes, Margaret Williams, Lisa Wetzl, Jonathan Denbo, Edward Hughes, Jane Dannenhauer, Nancy Gemmell, Jane Sherburne, Terry Good,

Christine Varney, John Libonati,
Jeff Undercoffer, Arnie Cole,
Cheryl Mills, and Stephen Waudby.

II For those dates after January 1998, the EOP shall also
conduct a search for non-ARMS e-mail containing the
following terms:

"Tripp", "Jane Mayer", "arrest
record", "Bacon", or "Bernath",

for the following individuals' e-mail:

Bernard Nussbaum, Craig
Livingstone, Anthony Marceca,
Hillary Rodham Clinton, Bill
Kennedy, Betsy Pond, Deborah
Gorham, Linda Tripp, Mari
Anderson, George Stephanopoulos,
Harold Ickes, Michael McCurry, and
Joseph Lockhart.

II For those dates after January 1998, the EOP shall also
conduct a search for non-ARMS e-mail containing the
search term "Willey"

for following individuals' e-mail:

Bernard Nussbaum, Craig
Livingstone, Anthony Marceca,
Hillary Rodham Clinton, Bill
Kennedy, Betsy Pond, Deborah
Gorham, Linda Tripp, Mari
Anderson, George Stephanopoulos,
Harold Ickes, Terry Good, Cheryl
Mills, President William Clinton,
Sidney Blumenthal, Bruce Lindsey,
and Charles Ruff.

- II The EOP may limit the scope of these searches to the White House Office ("WHO") bucket.

- II In conducting the search, the EOP may not apply the standard ARMS "exclusions" for transcripts of public documents. To the extent any of these documents are produced, however, they need not be reviewed for relevance.

- II The EOP is not required to search accounts established for the receipt of "citizen" e-mails sent to the President and the First Lady, via the Internet, by

members of the general public.

II The EOP shall search the archived C: drives of the following individuals:

William Kennedy, Vincent Foster,
Linda Tripp, Betsy Pond, and
Deborah Gorham

for the following search terms:

"background report", "summary
report", "OPS", "Dale", "Marceca",
"update project", "personnel
security", "FBI data," "FBI raw
data," "FBI reports," "FBI
summaries," "FBI background," "FBI
files", "Sculimbrene", "James
Baker", "Marlin Fitzwater", "BI",
"Privacy Act" or "Brasseux."

II The EOP shall also search the hard drives of William Kennedy, Betsy Pond, and Deborah Gorham for the following terms:

"Tripp", "Jane Mayer", "arrest
record", "Bacon", "Bernath," and
"Willey."

- II The EOP shall also search, to the extent that they exist, all archival tapes made of OPS hard drives during Livingstone's tenure at the OPS prior to June of 1996.
- II The EOP shall also conduct a search of Robert Haas' zip disk, currently in the custody of Mr. Easley at the EOP for the following search terms:

"background report", "summary report", "OPS", "Dale", "Marceca", "update project", "personnel security", "FBI data," "FBI raw data," "FBI reports," "FBI summaries," "FBI background," "FBI files", "Sculimbrene", "James Baker", "Marlin Fitzwater", "BI", "Privacy Act," "Brasseux," "Tripp", "Jane Mayer", "arrest record", "Bacon", "Bernath," and "Willey."

SO ORDERED

Royce C. Lamberth
United States District Court

Date: